

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

United States Courts  
Southern District of Texas  
ENTERED

FEB 11 2005

**Michael N. Milby, Clerk of Court**

HOYER-ODFJELL, INC,

Plaintiff,

vs.

TEKCHEM, S.A. de C.V.,

Defendant.

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CIVIL ACTION NO. H-04-0948

**MEMORANDUM AND RECOMMENDATION**

Before the court<sup>1</sup> is Defendant Tekchem, S.A. de C.V.'s motion to dismiss due to lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) (Dkt. No. 11). Having considered the motion, submissions of the parties, and applicable law, the court recommends that Tekchem's motion to dismiss be GRANTED.

**I. Background**

Tekchem (principal office and place of business in Mexico) and Bayer AG (principal office and place of business in Germany) entered into an agreement to transport a chemical known as PNCB from Germany to Mexico in "iso-containers," using the transportation services of Plaintiff Hoyer-Odfjell, Inc. (a Texas

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<sup>1</sup> This motion was referred to this magistrate judge for recommendation pursuant to 28 U.S.C. § 636(b)(1) (Dkt. No. 18).

corporation). Hoyer asserts that in the contract between Bayer and Tekchem, Tekchem agreed to pay freight charges to Bayer, but demurrage<sup>2</sup> charges, if any, would be paid directly to Hoyer. Hoyer contends that as a result of the unforeseen closing of Tekchem's factory in Mexico for almost one year, it was forced to store the chemicals in its own tanks. As a result, Hoyer alleges that Tekchem owes \$204,549.30 in demurrage charges.

## **II. Analysis**

### **A. Standard of Review**

Tekchem challenges the court's personal jurisdiction over it pursuant to Federal Rule of Civil Procedure 12(b)(2). Plaintiff Hoyer bears the burden of establishing personal jurisdiction. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 854 (5th Cir. 2000); *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996). If the court decides the motion to dismiss without holding an evidentiary hearing,<sup>3</sup> the party asserting jurisdiction need make only a prima facie showing of the facts on which jurisdiction is predicated. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002). The court accepts

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<sup>2</sup>Demurrage is defined as: "Liquidated damages owed by a charterer to a shipowner for the charterer's failure to load or unload cargo by the agreed time." *Black's Law Dictionary* 465 (8th ed. 2004).

<sup>3</sup> Neither party requested such a hearing, and the court agrees that this matter can properly be decided based on the motion papers alone.

as true the plaintiff's uncontroverted allegations, and resolves in its favor all conflicts of facts in the parties affidavits and other documentation. *See Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000).

**B. Personal Jurisdiction Standard**

A federal district court sitting in diversity may exercise personal jurisdiction over a foreign defendant if (1) the long-arm statute of the forum state creates personal jurisdiction over the defendant; and (2) the exercise of personal jurisdiction is consistent with the due process guarantees of the United States Constitution. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002). The Texas long-arm statute authorizes the exercise of personal jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 469-70.

The Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a foreign defendant when (1) that defendant has purposely availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *Id.* at 470. Sufficient minimum contacts will give rise to either specific or general jurisdiction. *Id.* Specific jurisdiction over a nonresident corporation is appropriate when that corporation has purposely directed its activities

at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. *See Alpine*, 205 F.3d at 215. General jurisdiction will attach where the nonresident defendant's contacts with the forum state, although not specifically related to the plaintiff's cause of action, are continuous and systematic. *See id.*

**C. Insufficient Contacts for Specific Jurisdiction**

Tekchem asserts the court lacks specific personal jurisdiction because all of the events giving rise to this action occurred in either Mexico or Germany. Hoyer counters there are sufficient minimum contacts based on a single e-mail between the parties where Hoyer maintains Tekchem acknowledges its debt to Hoyer, and other communications Hoyer sent to Tekchem attempting to collect the demurrage charges.

Doing business over the Internet can be a sufficient basis to establish personal jurisdiction. *See Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (adopting the standard of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), that courts should look to the "nature and quality of commercial activity that an entity conducts over the Internet" for determining personal jurisdiction). If a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet, then personal jurisdiction

is proper. *See Mink*, 190 F.3d at 336. In this case, however, there is a single e-mail from Tekchem to Hoyer acknowledging a meeting in Mexico City where the amount of demurrages claimed was discussed. Even accepting Hoyer's characterization of this e-mail as an acknowledgment of a debt, this is not of the nature and quality of commercial activity over the Internet to satisfy the *Mink* standard. *See id.* While a single e-mail committing a tort can give rise to personal jurisdiction, in the context of commercial transactions, a more substantial nexus with the forum state is generally required. *See, e.g., Machulsky v. Hall*, 210 F. Supp. 2d 531, 541-44 (D.N.J. 2002) (eBay purchase and corresponding e-mails not a sufficient premise for personal jurisdiction); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999) (e-mail communications must occur within the context of other substantial connections to the forum in order to constitute purposeful availment); *cf. Resuscitation Tech., Inc. v. Continental Health Care Corp.*, 1997 WL 148567, at \*5 (S.D. Ind. 1997) (the parties' use of the Internet to send eighty e-mails, as well as numerous phone calls and faxes, for the purpose of creating a joint venture to be based in forum state, made assertion of personal jurisdiction reasonable).

Hoyer also attempts to demonstrate specific personal jurisdiction based on the more general communications it directed to Tekchem. Hoyer relates that "HOYER routinely provided Defendant with an account of HOYER's services" and that

“HOYER submitted invoices to Defendant from January 10, 2002 through September 30, 2004.” Dkt. No. 26. However, the unilateral activity of the party that claims some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 n.16 (1985); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The proper focus is whether Tekchem’s acts showed that it purposefully availed itself of the privilege of conducting activities within Texas. *See Burger King*, 471 U.S. at 474. Hoyer has failed to demonstrate that Tekchem did so.

**D. Insufficient Contacts for General Jurisdiction**

Tekchem also asserts the court lacks general personal jurisdiction, maintaining it has no continuous or systematic contacts with Texas. It is not disputed that Tekchem is a Mexican corporation with no subsidiaries or facilities in the United States; no employees, agents, or representatives in Texas; no bank accounts in Texas; and no customers in Texas. Nevertheless, Hoyer contends that Tekchem has continuously and systematically placed its business products in Texas’ stream of commerce, and thus has purposely availed itself of the benefits and privileges of Texas’ laws. Hoyer points to the website of a Houston-based company, HCS Group, Inc., which lists Tekchem as a client, and suggests HCS performed consulting services for Tekchem. Hoyer also points to the website of Chem Sources, essentially

an online directory of chemical suppliers, which lists Tekchem as a participating chemical supplier and distributor.

Assuming Tekchem did avail itself of the services of a Texas-based company, and its products are distributed through an online source that is available in Texas, these contacts with Texas are not substantial enough to confer personal jurisdiction. The Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), held that merely making purchases from and seeking the consulting services of a Texas-based company did not establish personal jurisdiction. And a passive listing as a client on the website of another company, such as HCS Group, Inc., is clearly inadequate under Fifth Circuit precedent. See *Quick Tech., Inc. v. Sage Group PLC*, 313 F.3d 338, 345 (5th Cir. 2002) (maintaining a website containing company and product information with links to U.S. subsidiaries did not provide sufficient basis for personal jurisdiction); *Mink*, 190 F.3d at 336 (passive website advertising by a defendant on the Internet is insufficient to establish personal jurisdiction). *Mink* and *Quick Technologies* make clear that had Tekchem set up its own website passively advertising its products, personal jurisdiction would not be established. *A fortiori*, a passive listing on a third party's website is even less grounds for exercise of the court's jurisdiction.

As further evidence that Tekchem does business in Texas, Hoyer, after several additional months of discovery on the personal jurisdiction issue, has proffered several hundreds of pages of e-mails, invoices, and letters, many not in English, between Tekchem and parties unrelated to this litigation. Hoyer maintains these documents show: (1) a history of cargo business between Tekchem and Bayer, a German company, where Tekchem stored materials in Houston; (2) that Tekchem engaged the services of a Laredo-based shipper; (3) that Tekchem bought supplies from Texas companies; and (4) that Tekchem has been involved in marketing efforts to sell its products in Texas.

However, the documents submitted do not demonstrate that Tekchem's materials were stored in Houston; they simply show a spreadsheet listing the names of vessels, one of which was called the "Houston Express." Likewise, simply buying supplies from Texas businesses and using a Texas-based shipper is insufficient to give rise to jurisdiction under *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In *Helicopteros*, a Colombian corporation's contacts with Texas consisted of negotiating for and purchasing helicopters and accessories from Bell Helicopter Company in Fort Worth, Texas; sending pilots for training in the state; sending management and maintenance personnel to Texas for technical consultation; and receiving checks drawn upon a Houston bank. The Court held these contacts

insufficient to give rise to personal jurisdiction. *Id.* at 411, 416. In the same vein, merely purchasing supplies and services from unrelated third parties having a Texas connection does not establish personal jurisdiction.

And as for “numerous efforts” to market to Texas, Hoyer provides no evidence that such efforts were ever successful. Most of the purported marketing documents, at least the ones in English, appear to be purchase agreements between Tekchem and businesses based in California, Arizona, and Georgia. One page does contain a marketing and sales agreement between Tekchem and a company with a Texas post office box. But again, this is not adequate contact under *Helicopteros*, which held “that mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Helicopteros*, 466 U.S. at 418. Moreover, there is no indication that this agreement actually led to any sales in Texas. Hoyer has not demonstrated Tekchem’s nexus to Texas, nor that its claim in any way relates to the state.


### **III. Conclusion**

For these reasons, the court RECOMMENDS that Tekchem’s motion to dismiss be GRANTED.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties. The parties have ten (10) days from receipt to file written objections to the Memorandum and Recommendation. *See* FED. R. CIV. P. 72. Absent plain error, the failure to file written objections bars an attack on the factual findings, as well as the legal conclusions, on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208. Copies of the objections must be mailed to the opposing party and to the chambers of the magistrate judge, 515 Rusk, Suite 7727, Houston, Texas 77002.

Signed on February 11, 2005, at Houston, Texas.

  
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Stephen Wm. Smith  
United States Magistrate Judge